Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
JOHN A. KING, D.O.,

Petitioner,

versus

HILLCREST HEALTH CENTER, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID J. SCHENCK
Counsel of Record
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred by interpreting the "public disclosure" bar in the False Claims Act so as to conflict with decisions of both the Fourth and Seventh Circuits and the plain meaning of the text?

2. Whether the Tenth Circuit erred by construing the "original source" provision of the False Claims Act so as to conflict with a decision of the District of Columbia Circuit; the language, structure, and acknowledged purposes of the FCA; and the interpretation of a "public disclosure" from the same subsection?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Dr. John A. King, D.O., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 7, 2001.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Tenth Circuit is reported at 264 F.3d 1271 and is reprinted as Appendix A hereto.

The orders of the United States District Court for the Western District of Oklahoma are not reported and are reprinted as Appendix B hereto.

JURISDICTION OF THIS COURT

The Tenth Circuit entered the judgment below on September 7, 2001. Petitioner timely filed a suggestion for rehearing en banc. The court rejected the suggestion for rehearing en banc on October 1, 2001. *See* Pet. App. C. This Court may exercise jurisdiction to review the opinion below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

31 U.S.C. § 3730(e)(4):

(A) No court shall have jurisdiction over an action under this section based upon the public

disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve a growing conflict among the circuits concerning the interpretation of 31 U.S.C. § 3730(e)(4). The Tenth Circuit has construed the statute so as to preclude *qui tam* filings by persons who are indisputably the "original source" of information and, in so doing, has enlarged an existing conflict among the circuits and frustrated the acknowledged congressional purpose underlying the section.

Petitioner, Dr. John King, encountered evidence of complex Medicare and/or Medicaid fraud while working at Respondents' Hospital. In March 1997, two years after Respondents terminated his employment, Dr. King filed suit in federal district court, claiming, in part, that Respondents fired him in retaliation for objecting to

Respondents' fraudulent activities. The parties settled the suit in January 1999, and the district court dismissed it with prejudice the following month.

While the employment suit was pending, Dr. King's attorney, Mr. Weston C. Loegering, met with three Assistant United States Attorneys ("AUSAs") in November 1997 to discuss the alleged fraud. Without specifically disclosing the names of any parties, in view of obvious jeopardy concerns, Mr. Loegering outlined eight separate schemes Respondents utilized to defraud the government. In addition, he discussed a draft of Dr. King's proposed *qui tam* complaint in some detail, and followed up via telephone on a number of substantive questions posed by the AUSAs. Mr. Loegering also offered to arrange a meeting between Dr. King and the government. The AUSAs never accepted that invitation.

Well over three months later, on February 27, 1998, Dr. King filed under seal this *qui tam* action along with a "written disclosure of substantially all material evidence and information" he possessed pursuant to the False Claims Act. 31 U.S.C. § 3730(b)(2). The complaint and written disclosure repeated essentially the same information and allegations already revealed during Mr. Loegering's discussions with the AUSAs. The United States eventually declined to intervene, and the district court ordered the complaint to be unsealed and served on Respondents more than a year later in June 1999.

Respondents moved the district court to dismiss for lack of subject matter jurisdiction, arguing, *inter alia*, that the "public disclosure" bar in the FCA precluded Dr. King's suit because, under Tenth Circuit precedent, the

action was "based upon publicly disclosed information" – to wit, Dr. King's own employment suit. Respondents also asserted that Dr. King did not qualify for the "original source" exception to the public disclosure bar.

The district court ultimately granted the motion – after "reconsidering" its prior decision on the matter – ruling that even though Dr. King was the literal original source of the information, he could not be an "original source" within the meaning of the FCA because he failed to provide the government with the "information" upon which his *qui tam* action was based "before filing" suit.[1] Pet. App. B at 5-6 (Order, February 29, 2000).

The Tenth Circuit affirmed on appeal. While conceding that the language was intended simply to foreclose suits by parasitic individuals with no personal knowledge, the court first concluded that under prior precedent Dr. King's *qui tam* suit was "based upon" his own "public disclosure" of the fraud allegations contained in his employment suit against Respondents. *United States ex*

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[1] It is not clear from the district court's various orders whether the court determined that Dr. King did not provide *any* information prior to filing suit or that Dr. King did not provide *enough* information to the government prior to suit. The last order to expressly address the issue seems to suggest the court determined that Dr. King provided no information. Pet. App. B. at 6 (Order, February 29, 2000). Dr. King contested the court's ruling in a Rule 59 motion, and provided affidavits from his attorney outlining the pre-suit meetings with the AUSAs. In response, the government conceded the meetings took place but downplayed the scope of information disclosed. The court reviewed the entire record and summarily dismissed Dr. King's Rule 59 motion as requesting relief not warranted. Pet. App. B at 10 (Order, April 11, 2000).

rel. King v. Hillcrest Health Ctr., Inc., 264 F.3d 1271, 1278-79 (10th Cir. 2001), Pet. App. A at 10-12. Tenth Circuit precedent treated "based upon" a "public disclosure" to foreclose any *qui tam* action that shares a substantial identity with allegations found in any way in the file of prior litigation, even where, as here, the relator obviously did not derive his knowledge from the filing. This reading squarely conflicts with decisions by the Fourth and Seventh Circuits.

Yet despite this broad construction of subsection (e)(4)(A)'s "public disclosure" and "based upon" language, the Tenth Circuit nonetheless proceeded to interpret the "original source" voluntary disclosure requirement in subsection (e)(4)(B) quite restrictively. The court ruled, as a matter of first impression, that an "original source" must completely disclose to the government *all* essential elements of the underlying fraud, including, in particular, the parties' names, apparently without regard to the inculpatory consequences. *King*, 264 F.3d at 1280, Pet. App. A at 13-14. The court reasoned that pre-suit total disclosure would give the government even more time to investigate the fraud claims, the relator's knowledge, and to decide whether to intervene in the action. *Id.* at 1281, Pet. App. A. at 14. Because Dr. King did not reveal the parties' names directly to the AUSAs prior to filing suit – although the names were obviously part of the public disclosure and were fully accessible to the government – the court held that he did not qualify as an original source. *Id.* at 1281, Pet. App. A. at 14-15. Dr. King petitioned the court for rehearing en banc, which the court denied on October 1, 2001. *See* Pet. App. C.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit is not alone in struggling with these provisions. Indeed, the FCA *qui tam* provisions have generated substantial chaos in the courts. The Tenth Circuit's understanding of when a *qui tam* action is "based upon" a public disclosure under section 3730(e)(4)(A) conflicts with the Fourth and Seventh Circuits' holdings. *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) (FCA claim is not "based upon" information unless relator's knowledge is derived from it); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348-49 (4th Cir.) (same), *cert. denied*, 513 U.S. 928 (1994). Moreover, the court's total disclosure interpretation of the original source exception in section 3730(e)(4)(B) conflicts directly with the District of Columbia Circuit's interpretation of that provision's language. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (holding that "the information" in section 3730(e)(4)(B) means "*any* essential element of the underlying fraud").[2]

The Tenth Circuit's reading is not only in conflict with other circuits, it is also wrong. Congress amended the FCA in 1986 (to its current form) to correct "restrictive [judicial] interpretations" of its "*qui tam* jurisdiction

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[2] At least two federal district courts in the Fourth Circuit have stated that for purposes of the "original source" voluntary disclosure "only a 'core of knowledge' need be communicated, not a comprehensive whole." *United States ex rel. Ackley v. Int'l Bus. Mach. Corp.*, 76 F. Supp. 2d 654, 666 (D. Md. 1999) (quoting *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020 (E.D. Va. 1995)).

and other provisions in order to make the False Claim Act a more effective weapon against Government fraud." S. Rep. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. One result was the "public disclosure" bar and "original source" exception. The purpose, as even the Tenth Circuit has acknowledged, was clear: to provide "adequate incentives for whistle-blowing insiders" to come forward while discouraging parasitic *qui tam* suits by "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotations and citation omitted).

The Tenth Circuit decision below ignores the acknowledged purpose of the provisions, and essentially revives the type of "restrictive interpretations" the 1986 FCA amendments meant to supersede. The Circuit's expansive view of the public disclosure bar and its new "total disclosure" reading of the voluntary disclosure requirement in subsection 3730(e)(4)(B) block *qui tam* suits by quintessential whistle-blowers and will discourage them from volunteering valuable information in the future.

Neither of the court's interpretations are supported by the language, structure, or policies underlying the Act. The Tenth Circuit's broad view of the public disclosure bar stretches the meaning of "based upon the public disclosure" beyond all recognition and blocks non-parasites like Dr. King. Likewise, the court's reading of the original source exception fails to explain how that provision's general disclosure language could possibly require a more detailed disclosure than is required to constitute a "public disclosure," particularly when that language is

contrasted with the much more demanding language in section 3730(b)(2) of the same statute, which requires that "written disclosure of *substantially all material evidence and information the person possesses* shall be served on the Government." (Emphasis added). The contrast in terminology proves that had Congress wanted to impose a total disclosure requirement in section 3730(e)(4)(B), it would have simply said so.

This Court has never interpreted the public disclosure bar or original source exception. That lack of guidance combined with the provision's somewhat awkward drafting explains the current confusion surrounding § 3730(e)(4). *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 689 (D.C. Cir. 1997) ("As with the 'public disclosure' prong, courts addressing the 'original source' prong of the jurisdictional bar have interpreted it in varying ways."); Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 279 (1995) ("While courts have construed (or misconstrued) a number of the [FCA's] provisions, no provision has been so badly mangled as has the original source provision."). The Court's guidance is urgently needed to resolve the circuit conflicts surrounding section 3730(e)(4).

I. THE TENTH CIRCUIT'S INTERPRETATION OF "BASED UPON" IN SECTION 3730(e)(4)(A) CONFLICTS WITH THE FOURTH AND SEVENTH CIRCUITS' HOLDINGS AND THE PLAIN MEANING OF THE ACT

The FCA forbids a court jurisdiction over a *qui tam* suit "based upon the public disclosure" of fraud allegations. 31 U.S.C. § 3730(e)(4)(A). Although Dr. King obviously possessed first-hand, independent knowledge of the alleged fraud, the court below nevertheless concluded, bound by prior precedent, that his *qui tam* suit was "based upon" his own "public disclosure" of the fraud allegations contained in his employment suit against Respondents. *King*, 264 F.3d at 1279, Pet. App. A at 10-12. According to the Tenth Circuit, "based upon" means anything "supported by" or sharing a "substantial identity" with a prior disclosure, regardless of where or how the relator actually obtained his information. *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552-53 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *accord United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *Findley*, 105 F.3d at 682-85; *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566-68 & n.10 (11th Cir. 1994); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

The Fourth and Seventh Circuits have expressly rejected the Tenth Circuit's unorthodox interpretation. *Siller*, 21 F.3d at 1348-49; *Bank of Farmington*, 166 F.3d at 863. Instead, these two circuits have held that "based upon" in the FCA means exactly what it is commonly

understood to mean in any other context: to " 'use as a basis for' " or to be "derived from." *Siller*, 21 F.3d at 1348-49 (quoting *Webster's Third New International Dictionary* 180 (1986)); *see also Bank of Farmington*, 166 F.3d at 863 (citing *Siller*).

This approach makes much more sense given the plain meaning of the text and the underlying purpose of the provision. Textually, the Tenth Circuit's approach lacks support. Indeed, in announcing its rule, the court could only baldly assert that "[a]s a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.' " *Precision*, 971 F.2d at 552. In reality, as the Seventh Circuit noted, " 'based upon' is not synonymous with 'identical to' or 'similar to,' but can be substituted for 'derived from' wherever it occurs." *Bank of Farmington*, 166 F.3d at 863; *see also Siller*, 21 F.3d at 1349 ("We are unfamiliar with *any* usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.' "). Not surprisingly, courts that fall in line with the Tenth Circuit's interpretation generally do not claim any textual support, but merely move straight into a policy analysis. *See, e.g.*, *Findley*, 105 F.3d at 683 (arguing the phrase "based upon" is ambiguous and should be interpreted in light of structure and purpose of the FCA).

However, the policies underlying the *qui tam* provisions do not support an expansive reading of "based upon the public disclosure" either. The Tenth Circuit and every other court to discuss the matter acknowledge that Congress created the public disclosure bar to discourage parasitic *qui tam* suits by "opportunistic plaintiffs who have no significant information [of fraud] to contribute of

their own." *King*, 264 F.3d at 1278, Pet. App. A at 10 (internal quotations and citations omitted). The Fourth and Seventh Circuits' plain reading of "based upon" furthers this policy by blocking only those suits that are actually "derived" from a public source.

The test used by the Tenth Circuit obviously is at odds with congressional policy. For example, the Fourth Circuit, criticizing the Tenth Circuit's approach, stated: "it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic." *Siller*, 21 F.3d at 1348. It should go without saying that a lawsuit that is not parasitic "should not be barred by a provision meant to bar parasitic lawsuits." *Bank of Farmington*, 166 F.3d at 863.

II. THE TENTH CIRCUIT'S INTERPRETATION OF HOW MUCH "INFORMATION" AN "ORIGINAL SOURCE" MUST VOLUNTARILY DISCLOSE PURSUANT TO SECTION 3730(e)(4)(B) IS IN CONFLICT WITH A HOLDING OF THE DISTRICT OF COLUMBIA CIRCUIT AND THE TEXT OF OTHER FCA PROVISIONS

Congress provided an exception to the "public disclosure" bar for "original source" relators. The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided *the information* to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Dr.

King undisputedly possessed the requisite direct and independent knowledge of fraud. Furthermore, he voluntarily provided the government with substantial information of the fraud three months before he filed suit. Yet the court denied him "original source" status because it said he did not provide the government enough information. At bottom, the Tenth Circuit ruled that *"the information"* to be provided under section 3730(e)(4)(B) means all the information the relator possesses. *King*, 264 F.3d at 1280, Pet. App. A at 13-14.

The Tenth Circuit's "total disclosure" rule is in direct conflict with a decision of the District of Columbia Circuit interpreting the same language, *Springfield Terminal Ry.*, 14 F.3d at 656-657, and cannot be reconciled with the text from other FCA provisions. The "original source" definition uses the term "the information" three times. Presumably, it means the same in all three instances. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (identical words used in the same statutory section presumed to have the same meaning). The most detailed of those three uses reads: "an individual who has direct and independent knowledge of *the information* on which the allegations are based." (Emphasis added).

Contrary to the Tenth Circuit's holding, the District of Columbia Circuit has construed that phrase to mean "direct and independent knowledge of *any essential element of the underlying fraud transaction.*" *Springfield Terminal Ry.*, 14 F.3d at 657 (emphasis added). Hence, "the information" in section 3730(e)(4)(B) means "any essential element of the underlying fraud." "Any essential element" plainly means any one of several elements, not

"all the essential elements" or "every essential element." *See id.* at 656-57.[3]

Furthermore, the court's construction of the original source exception cannot be reconciled with the FCA's text. Subsection 3730(b)(2) requires *all* relators to file their *qui tam* complaints under seal and serve the government with a "copy of the complaint and *written disclosure of substantially all material evidence and information the person possesses.*" *Id.* (emphasis added). This language demonstrates that Congress knew how to impose comprehensive disclosure requirements on "original source" relators. However, Congress chose the less comprehensive language in subparagraph (e)(4)(B).

III. THE TENTH CIRCUIT'S POLICY RATIONALE FOR ITS TOTAL DISCLOSURE RULE CONFLICTS WITH THE STRUCTURE OF THE FCA AND THE ACKNOWLEDGED PURPOSE OF THE ORIGINAL SOURCE PROVISION

The Tenth Circuit attempted to justify its "total disclosure" rule on the grounds that Congress intended the "original source" voluntary disclosure requirement to provide the government with notice of fraud and the informational means to begin an immediate investigation

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[3] In addition, two federal district courts have stated that "the information" to be provided the government under (e)(4)(B) need only amount to a " 'core of knowledge,' " rather than a "comprehensive whole." *United States ex rel. Ackley v. Int'l Bus. Mach. Corp.*, 76 F.Supp.2d 654, 666 (D. Md. 1999) (quoting *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020 (E.D. Va. 1995)). The panel cited *Ackley*, but did not discuss its conflicting interpretation.

(of both the relator and alleged defrauders). *See King*, 264 F.3d at 1281, Pet. App. A. at 14. The court's rationale completely misses the point of the voluntary disclosure requirement and produces an absurd result at odds with the structure and purpose of the Act itself.

Even cursory analysis of the statute demonstrates that Congress specifically designed other FCA provisions to play the "informant/notice" role the Tenth Circuit has wrongly ascribed to the "original source" disclosure requirement. For example, subsection (b)(2) requires the *qui tam* complaint to be filed under seal, for at least sixty days, in order to provide the government ample time to decide whether to intervene in the action. If sixty days proves insufficient, the government may (and invariably does) request additional time to consider its options fully. 31 U.S.C. § 3730(b)(3); *see also Siller*, 21 F.3d at 1341 (government received eight extensions and took twenty-one months to decide whether to intervene).[4]

In stark contrast, the "original source" disclosure language instructs that the information merely be provided "before" the relator files suit. Under the plain language of the provision, the relator can proffer the information literally any time "before" filing suit. The government would gain no realistic benefit from an "original source's" total disclosure provided one day, two days, or even two weeks "before" the relator files his *qui tam* suit and submits a comprehensive written disclosure. In short, the government does not need any extra time in

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[4] As noted earlier, Dr. King's *qui tam* suit remained under seal for over a year.

light of subsection (b)(2)'s existing provisions, and the plain language of (e)(4)(B)'s disclosure requirement would not provide it any if it did.

Furthermore, reading a total disclosure requirement into the "original source" exception produces an absurdly designed statute. For instance, when there has been no public disclosure of the fraud allegations, the only notice of fraud the government receives and the only notice it needs, presumably, comes when the relator first files suit and submits his written disclosure of all material facts pursuant to subsection (b)(2). On the other hand, if there has been a public disclosure of the fraud allegations, the Tenth Circuit rule would now dictate that the government receives, and somehow needs, *three* disclosures of the fraud: first, from the public disclosure itself, which by definition publicizes enough information to allow the government to pursue an investigation, *see, e.g., United States v. Alcan Elec. and Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999); *Findley*, 105 F.3d at 679; *Sandia*, 70 F.3d at 571-72; second, from the "original source" pre-suit disclosure; and third, from the detailed disclosure required at the time the relator files his *qui tam* action.

There simply is no rational explanation for such a result and no reason to think Congress intended it. Indeed, it would make more sense to require a pre-suit disclosure in non-publicly disclosed actions, where the government has no advance notice of the allegations, than it does to require it in the public disclosure scenario

where the government necessarily has notice prior to the *qui tam* suit.[5]

The FCA's structure simply does not support the Tenth Circuit's reading of the "original source" voluntary disclosure requirement. In fact, it suggests that the provision does not serve a government-notice function at all. That job is ably handled by subsection (b). Rather, the "original source" exception was created to protect relators, as the FCA's history makes clear, and its requirements must be read in that light.

When Congress amended the FCA to its present form in 1986 it sought a *qui tam* provision that could simultaneously encourage whistle-blowing while discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Thus was born the "public disclosure" bar (to discourage parasitic suits) and the "original source" exception (to encourage "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity"). S. Rep. No. 99-345, at 4, 1986 U.S.C.C.A.N. at 5269.

The history demonstrates that Congress created the "original source" provision to benefit and protect relators, not the federal government. It was designed to

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[5] It is particularly puzzling how the Tenth Circuit concluded on the one hand that there had been a public disclosure, by definition sufficient to set the government on the trail of fraud, but on the other hand deny Dr. King "original source" status on the grounds that the government did not have enough information to investigate his allegations.

reward whistle-blowers that cooperate with the government by preserving their *qui tam* suits even where the fraud may be generally known. To accomplish this, the provision defines the types of relators Congress wanted to encourage – those with independent and direct knowledge of fraud – in a way that requires their cooperation with the government – because they must "voluntarily" share information before filing suit.

The operative inquiry, therefore, is whether the relator has volunteered direct and independent information (i.e., any essential element) of fraud to the government. Quibbling over the amount of information provided misses the point of the "source" requirement, which has much more to do with the fact that the information be "voluntarily provided" than it does with whether the relator discloses every last detail, only to do it again when suit is actually filed. The Seventh Circuit has made essentially this same point. *Bank of Farmington*, 166 F.3d at 865-66.

In the instant case, Dr. King easily satisfies the "original source" requirement as it was written and intended by Congress. He undisputedly possesses original information of the fraud. And he undisputedly established himself as a source[6] of that information by providing

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[6] Significantly, the provision does not limit itself to protecting a relator who is *the* government's original source. Instead, it expressly protects "*an* original source of the information," 31 U.S.C. § 3730(e)(4)(A) (emphasis added), i.e., "someone who would have learned of the allegation or transactions independently of the public disclosure." *Bank of Farmington*, 166 F.3d at 865. When such a "someone" shares

numerous essential elements of the fraud allegations and offering to make himself available to the government for interviews long before he filed suit. The FCA's text and purposes requires no more.

IV. THE TENTH CIRCUIT'S TOTAL DISCLOSURE RULE DESTROYS THE BALANCE CONGRESS INTENDED BETWEEN THE PUBLIC DISCLOSURE BAR AND THE ORIGINAL SOURCE EXCEPTION EVEN ASSUMING ITS RATIONALE FOR THE RULE IS CORRECT

Even if the Tenth Circuit's notice-to-the-government rationale for the "original source" disclosure requirement were correct, the court's comprehensive disclosure rule would still be wrong because it undermines the balance Congress intended between sections 3730(e)(4)(A) and (e)(4)(B).

As noted earlier, many courts have been liberal in determining what constitutes a "public disclosure" for purposes of section 3730(e)(4)(A). *See, e.g., Springfield Terminal Ry.*, 14 F.3d at 652 (information revealed only during the discovery phase of a civil trial deemed "publicly disclosed"). The decisions turn on the notion that a disclosure is sufficiently public to trigger Congress' purposes if it reveals enough information "to enable the government to conduct an investigation." *Alcan*, 197 F.3d at 1018-19 (citing *Sandia*, 70 F.3d at 571; *Findley*, 105 F.3d at 688). Significantly, a disclosure has been held to be

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information with the government before filing suit, he qualifies as a "source" and thereby stakes his claim to "original source" status.

public even though it did not identify the participants by name. *See Alcan*, 197 F.3d at 1018-19; *Sandia*, 70 F.3d at 571.

Reason dictates that the voluntary disclosure requirement in subparagraph (B) should be construed so as to be consistent with a public disclosure in subparagraph (A). Congress drafted subparagraphs (A) and (B) to work together in achieving "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal Ry.*, 14 F.3d at 649. Construing one of the disclosure provisions more broadly than the other destroys the careful balance Congress intended.

Despite Dr. King's substantial disclosure, the Tenth Circuit's holding rested on the determination that without the participants' names the government could not conduct its own investigation of the matter. *King*, 264 F.3d at 1281, Pet. App. A at 15. For "public disclosure" purposes, however, the Ninth and Tenth Circuits have held that the participants' names are not necessary for the government to investigate fraud. *Alcan*, 197 F.3d at 1018-19; *Sandia*, 70 F.3d at 571. Indeed, there can be no question that Dr. King's voluntary disclosure to the government would qualify as a public disclosure under Tenth Circuit precedent. Nothing is gained by reading the "public disclosure" provision so broadly while simultaneously reading the "original source" voluntary disclosure requirement so narrowly that it bars a *qui tam* suit by Dr. King, the uncontroverted original source in any meaningful sense of the phrase.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted,

DAVID J. SCHENCK
Counsel of Record
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

APPENDIX A

UNITED STATES of America, ex rel. John A. KING, D.O., Plaintiff-Appellant,

v.

HILLCREST HEALTH CENTER, INC., Harvey Drapkin, D.O., John B. Hughes, D.O.; Richard J. Langerman, Sr., D.O.; Tom W. Ewing, D.O.; Anthony L. Cruse, D.O.; Raymond Dieter, D.O.; Mona Motz, D.O.; Glenn L. Smith, D.O.; and Joe Goldstein, D.O., Defendants-Appellees.

United States of America, Amicus Curiae.

No. 00-6158

United States Court of Appeals, Tenth Circuit.

Sept. 7, 2001.

Before BRISCOE, MURPHY, Circuit Judges, and CROW,* District Judge.

CROW, District Judge.

Relator John A. King, D.O. appeals the dismissal of this *qui tam* action brought under the False Claims Act ("Act"), 31 U.S.C. §§ 3729-3733. The *qui tam* provisions of the Act permit private individuals to sue on behalf of the United States those persons or entities who allegedly have presented false or fraudulent claims to the federal

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* Honorable Sam A. Crow, District Judge, United States District Court for the District of Kansas, sitting by designation.

government.[1] As one of its jurisdictional hurdles, the Act prohibits suits based on publicly disclosed information unless the relator or person suing is an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A). The principal issue presented is whether the relator Dr. King qualifies as an "original source" under § 3730(e)(4)(B). Agreeing with the district court's determination that the plaintiff cannot show he meets the requirements for an original source, we affirm the district court's judgment dismissing this action for lack of subject matter jurisdiction.

I. BACKGROUND

As part of his residency training program at Oklahoma State University College of Osteopathic Medicine, Dr. King was employed as a resident physician in orthopedic surgery at the defendant Hillcrest Health Center, Inc. ("Hillcrest") from May of 1993 until his termination in March of 1995. In March of 1997, Dr. King filed a federal action, *King v. Hillcrest Health Center, et al.*, No. 97-0401-T (*"King I"*), asserting claims for relief under federal civil rights statutes and state law. He alleged in part that he was terminated in retaliation for reporting that the defendants were committing Medicare and/or Medicaid fraud. The parties to *King I* settled that suit in January 1999, and it was dismissed with prejudice in February of 1999.

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[1] Under the Act, a successful relator shares in the recovery whether or not the government intervenes. 31 U.S.C. § 3730(d)(1).

While *King I* was pending, Dr. King filed this *qui tam* action under seal on February 27, 1998, alleging that the defendants had conspired to submit and had submitted false or fraudulent claims for medical services and procedures billed under Medicare and/or Medicaid. The United States declined to intervene, and the district court in June of 1999 ordered the complaint unsealed and served. The defendants moved to dismiss the plaintiff's first amended complaint arguing, *inter alia*: (1) that the district court lacked subject matter jurisdiction because *King I* constituted a public disclosure of information and Dr. King did not qualify as an "original source" of the information, and (2) that the dismissal with prejudice of *King I* bars this action under the doctrine of *res judicata*. Besides opposing the defendants' motions, the plaintiff moved for leave to file a second amended complaint.

A. *District Court's Order Dismissing on Res Judicata Grounds*

Considering first the challenge to its subject matter jurisdiction, the district court found the proposed second amended complaint to have sufficiently alleged that Dr. King had direct and independent knowledge of the defendants' fraudulent schemes and had gained this knowledge from his own efforts and personal observations. A plaintiff claiming to be an "original source" also must allege that he voluntarily provided the relevant information to the federal government prior to filing the *qui tam* suit. With respect to this pleading requirement, the district court concluded:

> Because the defendants have not contested King's allegation that he did voluntarily provide

> the information prior to filing this lawsuit, the Court finds for purposes of Rule 12(b)(6) that King has sufficiently alleged that he is an "original source" of the information and that the Court has subject matter jurisdiction over his claims.

(II Aplt. App. at 324). Turning away the subject matter jurisdiction challenge, the district court granted the motions to dismiss on *res judicata* grounds finding an identity of causes of action in *King I* and the *qui tam* suit. The district court also denied Dr. King's motion to amend on futility grounds.

B. *First Rule 59(e) Motion and Amicus Curiae Brief*

Dr. King filed a Rule 59(e) motion asking the court to reconsider its *res judicata* analysis. In response, the United States of America ("United States") filed an *amicus curiae* brief concurring with the relator's position on the *res judicata* issue and notifying the district court "that it has no record of the relator providing any information to the government on which the allegations in the *qui tam* are based at any time prior to February 27, 1998, the date the complaint was filed." (II Aplt. App. at 365-66). The district court promptly followed up with a brief order saying it had "reviewed" the United States' *amicus curiae* brief and giving the parties an additional eight days "to file responses, if they so choose, to the arguments, authorities and statements contained therein." (II Aplt. App. at 369).

In the additional time provided by the district court, the defendants filed their response on February 22, 2000, and Dr. King filed none. The defendants addressed not only the *res judicata* arguments but the government's

statement that Dr. King had not provided it with information before filing the *qui tam* complaint. The defendants pointed out that the district court had been misled by the allegation in Dr. King's proposed second amended complaint that he had provided the government with a statement of all material evidence and information when he filed his original *qui tam* complaint. While the district court had characterized and denied their prior "facial attack" on subject matter jurisdiction, the defendants maintained the government's filing suggested facts showing the lack of subject matter jurisdiction. The defendants called on the court to consider the government's brief in dismissing this action pursuant to Fed. R. Civ. P. 12(h)(3). Prior to the district court's second dismissal order filed seven days later, Dr. King did not seek leave to file a reply or supplemental brief.

C. *District Court's Second Dismissal Order*

On February 29, 2000, the district court vacated its prior order of dismissal on res judicata grounds and dismissed the action for lack of subject matter jurisdiction. The district court held:

> The defendants contested only the timeliness of King's disclosure of information to the government in connection with *King I*. The defendants did not contest the timeliness of the disclosure vis-a-vis the *qui tam* action, and the Court found King had sufficiently alleged for purposes of the pending Motions to Dismiss that he was an "original source" of the information, and that the Court therefore had subject matter jurisdiction over his claims.

> The United States has now advised the Court and opposing counsel in its amicus curiae brief that it has no record of King providing any information about the allegations giving rise to this lawsuit prior to February 27, 1998, the date the original complaint was filed. In light of the government's clarification about King's actions, the Court concludes that reconsideration of its Order is necessary to the extent the Court now finds King did not provide the information on which the allegations in the *qui tam* action are based prior to filing the FCA action. King therefore does not qualify as an "original source," and, consequently, this action is barred. *E.g.*, *Spectrum*, 190 F.3d at 1157 (FCA specifically bars all *qui tam* actions based on publicly disclosed information unless person bringing action was "original source" of information).

(II Aplt. App. at 387-88). Relying on Fed. R. Civ. P. 12(h)(3), the district court based its jurisdictional ruling on the suggested facts stated in the government's *amicus curiae* brief rather than the allegation appearing in Dr. King's proposed second amended complaint or the statement in Dr. King's memorandum of law filed on November 4, 1999, that he had "provided detailed information organized in notebooks to the U.S. Attorney in Oklahoma City and to the Department of Justice prior to filing this action." (II Aplt. App. at 387).

D. *Dr. King's Second Rule 59(e) Motion*

In his second Rule 59(e) motion, Dr. King argued he had satisfied the voluntary disclosure element of the "original source" definition and attached an affidavit from his attorney Weston Loegering outlining their

efforts to make this pre-filing disclosure. Specifically, Mr. Loegering averred that he met with three assistant United States attorneys in November of 1997, shared some information and allegations from his client, and offered to make his client available for an interview. Following up on questions asked of him during that meeting, Mr. Loegering provided additional information by telephone calls and voice-mail to the assistant United States attorneys.

The government filed a response with supporting affidavits acknowledging that a meeting with Mr. Loegering did take place in November of 1997 but with only general information disclosed and the names withheld. According to the government's attorneys, Mr. Loegering provided information of several schemes but withheld the names of his client and of the potential defendants, and he claimed to have documentation and a draft complaint but submitted neither to them. In her affidavit, Assistant U.S. Attorney Susan Dickerson Cox averred that she had attended this meeting in November of 1997 but that Mr. Loegering established a framework to keep the meeting "general in nature, on a no-name basis" with "an actual proffer" to be furnished later. (II Aplt. App. at 424). The affidavit highlighted that Mr. Loegering never disclosed "the identity or name of any of the people or entities involved." *Id.* "Neither the identity of the Relator, nor that of the defendants, nor a proffer, nor documentation of any scheme, nor a draft Complaint was provided to this Affiant prior to filing the Complaint." *Id.* The relator filed a reply brief that did not address the government's response or the affidavit of Cox.

The district court observed that in his second Rule 59 motion Dr. King had "challenged the government's allegations regarding the timeliness and extent of his disclosure." (II Aplt. App. at 461). Referring to "the record in its entirety," the district court summarily denied Dr. King's motion as requesting relief "not warranted." *Id.*

The relator appeals arguing: (1) that a public disclosure did not occur and that the district court erred in apparently assuming a public disclosure had occurred; (2) that he fulfilled the letter and intent of the voluntary, prefiling disclosure requirement of § 3730(e)(4)(B); and (3) that the district court failed to follow proper summary judgment procedure.

II. STANDARD OF REVIEW

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*, applying the same standard used by the district court. *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229, 120 S.Ct. 2657, 147 L.Ed.2d 272 (2000). Jurisdictional challenges based on the public disclosure bar "arise out of the same statute creating the cause of action (*i.e.*, the False Claims Act) and are thus necessarily intertwined with the merits of the case." *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1159 (10th Cir. 1999). Consequently, the court should resolve this issue under either Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure. *Id.*

When it denied initially the defendants' jurisdictional challenge, the district court relied on Rule 12(b)(6) judging only the sufficiency of Dr. King's allegations that the

defendants had attacked facially but not factually. When it later sustained the defendants' jurisdictional challenge under Rule 12(h)(3), the district court relied on facts suggested in the government's *amicus curiae* brief and eventually considered affidavits submitted by the government and the relator. Applying the legal standards of Rule 56, the court will review *de novo* the district court's dismissal for lack of subject matter jurisdiction. *See United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1543 (10th Cir. 1996).

Having limited jurisdiction, federal courts do not presume jurisdiction to exist but require an adequate showing of jurisdiction from the party invoking it. *Hafter*, 190 F.3d at 1160. Upon a jurisdictional challenge, that party bears the burden of alleging the facts critical to jurisdiction and coming forth with competent proof. *Id.* The premise of limited jurisdiction also means the Act "should not be read in a manner that impermissibly expands federal jurisdiction." *MK-Ferguson*, 99 F.3d at 1544 (citation omitted).

III. DISCUSSION

The Act denies a court of jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a . . . civil, . . . hearing, . . . , unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). The Act defines "original source" to mean "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action

under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). "The FCA's jurisdictional scheme seeks 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.' " *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)); *see United States v. Bank of Farmington*, 166 F.3d 853, 858 (7th Cir. 1999).

At the summary judgment stage, this public disclosure bar to jurisdiction entails four questions.

> (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act; (3) whether the relator's complaint is "based upon" this public disclosure; and, if so, (4) whether the relator qualifies as an "original source."

Hafter, 190 F.3d at 1161 (quoting *MK-Ferguson Co.*, 99 F.3d at 1544 (10th Cir. 1996)). A court's decision should begin with the first three issues governing public disclosure, as the " 'original source' issue is necessary only if the court answers the first three questions in the affirmative." *Id.*

A. *Public Disclosure*

On appeal, Dr. King contests whether *King I* is a public disclosure and whether the *qui tam* action is based upon the public disclosure. Before the district court, Dr.

King essentially conceded both issues when he jumped past these issues and argued only that he qualified as an original source in opposing the defendants' original motions to dismiss.[2] For that matter, Dr. King waited until his reply brief in support of his second Rule 59 motion to complain of the district court's failure to make an express finding that *King I* was a public disclosure. Grounds or arguments in support of subject matter jurisdiction may be waived like any other contention. *Franklin Savings Corp. v. United States,* 180 F.3d 1124, 1129 (10th Cir.), *cert. denied,* 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 310 (1999). Even assuming that one or all of these issues had been timely raised before the district court, Dr. King still faces the holding in *United States ex rel. Precision Co. v. Koch Industries, Inc.,* 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied,* 507 U.S. 951, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993), that a *qui tam* action is based on a public disclosure when its allegations share a substantial identity with the allegations in prior litigation. Absent an en banc rehearing, we are bound to follow *Precision* here. *Eberl's Claim Service, Inc. v. C.I.R.,* 249 F.3d 994, 1003 (10th Cir. 2001); *United States v. Meyers,* 200 F.3d 715, 720 (10th Cir. 2000) ("The precedent of prior panels which this

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[2] The relator did cite in a footnote several federal district court opinions from jurisdictions outside the Tenth Circuit as holding that the public disclosure bar did not apply to information disclosed in prior litigation. (II Aplt. App. at 246). The relator, however, ended his footnote with a citation of *But see United States ex rel. Precision Co. v. Koch Industries, Inc.,* 971 F.2d 548, 553-54 (10th Cir. 1992), *cert. denied,* 507 U.S. 951, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993). Other than citing these cases, the relator made no effort to distinguish the *Precision* decision or to argue that it was not controlling here.

court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law"). Being no dispute that a substantial identity exists, *King I* is a public disclosure under § 3730(e)(4)(A) that bars jurisdiction of the *qui tam* action unless Dr. King qualifies as an original source.

B. *Original Source*

Dr. King contends he satisfied the requirements for being an original source. Not only did he have direct and independent knowledge of the information on which the allegations are based, but his attorney met and discussed those allegations with assistant United States attorneys before ever filing the *qui tam* suit. Dr. King insists the voluntary pre-filing disclosure by his attorney, though conducted on a no-name basis, should be held sufficient in that it conveyed the substance of his fraud allegations.

The two jurisdictional elements in the "original source" exception at § 3730(e)(4)(B) are:

> First, the *qui tam* relator must have "direct and independent knowledge of the information on which the allegations are based." *Precision*, 971 F.2d at 553. Second, the *qui tam* relator must have "voluntarily provided" the information to the government prior to filing suit. *Id.*

MK-Ferguson, 99 F.3d at 1547. In other words, the relator must not only be the "source," that is, one who voluntarily provides the information to the government before filing an action, but the relator must also be the "original source," that is, one who has direct and independent

knowledge of the information on which the allegations are based. *United States v. Bank of Farmington*, 166 F.3d at 865. To avoid the jurisdictional bar created by "public disclosure," a relator must have direct and independent knowledge of the information on which the *qui tam* allegations are based and must have provided the same information to the government prior to filing the *qui tam* action. It is the "source" element that is the focus of this appeal.

The statute does not lay out and the courts have not settled on what it means to have "voluntarily provided the information to the Government before filing an action." § 3730(E)(4)(B); *see Bank of Farmington*, 166 F.3d at 865. The language of a statute is ordinarily conclusive absent a clearly expressed legislative intent to the contrary, and the plain meaning of that language generally controls unless this results in ambiguity or absurdity. *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d at 552. "Not only are we governed by the plain language of the statute, we must also be mindful that 'statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.' " *Id.* (quoting *F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964)).

Subparagraph (B) is a single sentence. It refers to "information" as that "on which the allegations are based." Specifically, "[t]he 'information on which the allegations are based' means the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." *Hafter*, 190 F.3d at 1162 (citation omitted). "The word 'information' refers to *any* essential element of the fraud transaction (*e.g.*, Y)." *United States ex*

rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir.) (quoting *Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994)), *cert. denied*, 522 U.S. 865, 118 S.Ct. 172, 139 L.Ed.2d 114 (1997); *see also Sandia Corp.*, 70 F.3d at 572. Thus, before filing the *qui tam* action, a relator must voluntarily provide the Government with the essential elements or information on which the *qui tam* allegations are based.

It is also clear from the statutes that compliance with the disclosure requirements of § 3730(b)(2) at the time of filing does not satisfy the pre-filing disclosure requirement of § 3730(e)(4). *Farmington*, 166 F.3d at 866; *Findley*, 105 F.3d at 690. "More must be done to qualify as an original source than to file the action. The government must be voluntarily notified beforehand." *Farmington*, 166 F.3d at 866 (citation omitted). The pre-filing voluntary disclosure requirement encourages private individuals to come forward with their information of fraud "at the earliest possible time and . . . discourage[s] persons with relevant information from remaining silent." *Farmington*, 166 F.3d at 866 (quotation and citations omitted). Besides giving the government more time than the post-filing period to act on the fraud allegations, this requirement also gives the government the chance "to consider whether there has already been public disclosure of the matters, whether the prospective relator in fact possesses direct and independent knowledge of the matters he is disclosing, and whether he is making disclosure on a voluntary basis." *United States ex rel. Ackley v. Intern. Business Machines*, 76 F. Supp. 2d 654, 668 (D. Md. 1999).

The narrow question raised on appeal is whether a relator qualifies as a "source" if in making his pre-filing

disclosure he withholds his identity and the identities of the potential defendants. The identities of the accuser and the accused are information, *i.e.* essential elements of the fraud transaction, on which the *qui tam* allegations are based. As for the information about the fraudulent schemes that was disclosed, there is little question that the government's ability to analyze and assess it was hampered, if not blocked, by this omission of identities. To withhold the identities of the relator and perpetrator deprives the government of key facts necessary in its efforts to confirm, substantiate or evaluate the fraud allegations. Without the identities, the information behind the allegations essentially remains in the relator's possession and undisclosed to the government, and what has been disclosed could be said to be little more than a hypothetical account given by an attorney.

That the relator's attorney offered to make his client available for an interview or that the government could have discovered the defrauding entities upon investigation must be rejected as efforts to dilute the very jurisdictional requirements set by Congress. Section 3730(e)(4) requires an individual to provide voluntarily the information to the government before filing the *qui tam* action. Plainly, the statute imposes the responsibility on the relator to meet these requirements in order to qualify as an "original source" and, other than the implied obligation of being available to accept such disclosures, places no additional investigative duties on the government to assist a relator in meeting this jurisdictional requirement. Applying these jurisdictional requirements in this manner encourages private individuals to come forward quickly with their information, to not dawdle when there

has been a public disclosure, and to discourage persons from withholding or remaining silent about their relevant information. *See Farmington*, 166 F.3d at 866. In sum, the relator's decision to withhold from his voluntary disclosure to the government, his identity and that of the potential defendants, kept him from meeting the jurisdictional requirements of an original source.[3]

C. *Summary Judgment Procedure*

Though acknowledging that a court may dismiss *sua sponte* for lack of subject matter jurisdiction, *see* Fed. R. Civ. P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"), Dr. King relies on notions of "fairness and common sense" in arguing he was denied effective notice of the voluntary pre-filing disclosure issue and the timely opportunity to present evidence on the same. As the

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[3] Citing decisions from the Sixth and D.C. Circuits, the appellees ask the court to read § 3730(e)(4)(B) as requiring a relator to make the voluntary disclosure to the government not just "before filing" the *qui tam* action but before the public disclosure. The Tenth Circuit has discussed the voluntary disclosure element as something to be accomplished "prior to filing suit." *See, e.g., United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996). Having concluded that Dr. King failed to make an adequate voluntary disclosure prior to filing suit, the court need not consider this issue regarding the timing of the disclosure. For the same reason, the court will not tackle the appellees' alternative arguments for affirming the district court's judgment.

appellees point out, a district court is vested with discretion to set procedures for determining subject matter jurisdiction. *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d at 551 n. 1 ("Because there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." (quotation omitted)). Relying on the post-judgment "suggestion" in the *amicus curiae* brief that subject matter jurisdiction may be lacking, the district court invited responses from the relator and the defendants. This court agrees that the district court's invitation certainly could have been more specific about the issues to be briefed. For that matter, the district court should have set out a procedure for briefing this issue and submitting evidence on the same.

The district court's failure to set and follow a procedure, however, did not prejudice Dr. King so as to require reversal. Because the defendants had earlier challenged the court's jurisdiction due to public disclosure, Dr. King "had an opportunity to sufficiently plead their original source status" in the proposed second amended complaint and attach the proof necessary to support those allegations. *Hafter*, 190 F.3d at 1160 n. 5. The district court then gave Dr. King the additional opportunity to respond to the government's brief that included this Rule 12(h)(3) suggestion. More importantly, because he undisputedly withheld identities from his voluntary disclosure, Dr. King is unable to argue that the lack of notice and opportunity to present evidence precluded him from proving that the requirements for an original source were satisfied. Thus, even assuming the district court did err in not setting and following established procedures and in

not granting the Rule 59(e) motion and conducting an evidentiary hearing, Dr. King's attorney's affidavit would not sustain a finding that the relator had made an adequate pre-filing disclosure.

IV. CONCLUSION

In sum, we conclude that *King I* was a public disclosure under § 3730(e)(4)(A) and that Dr. King is unable to prove he made the voluntary pre-filing disclosure required under § 3730(e)(4)(B). The district court's order dismissing this action for lack of subject matter jurisdiction is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA ex rel. JOHN A. KING, D.O., Plaintiff,	)	
vs.	)	No. CIV-98-295-W
HILLCREST HEALTH CENTER, INC., et al., Defendants.	)	

ORDER

(Filed Feb. 29, 2000)

This matter comes before the Court on the Motions to Dismiss filed by defendants Glenn L. Smith, Raymond Dieter, Mona Motz, D.O., Joe Goldstein, D.O., Tom W. Ewing, Anthony L. Cruse, D.O., Richard J. Langerman, Sr., D.O., John B. Hughes, D.O., Hillcrest Health Center, Inc. (Hillcrest) and Harvey Drapkin, D.O. The plaintiff, John A. King, D.O., not only responded to the motions but also moved the Court for leave to file a second amended complaint. All defendants, save Smith and Dieter, objected to King's request to amend. Based upon the record, the Court on January 4, 2000, denied King's Motion for Leave to File Second Amended Complaint and granted the defendants' Motions to Dismiss.

The matter now comes before the Court on King's Motion to Reconsider or to Alter or Amend Judgment filed pursuant to Rule 59, F.R.Civ.P. All defendants have

responded in opposition to the motion, the United States of America has filed an amicus curiae brief and the defendants have responded to the amicus curiae brief. Upon review of these submissions, the Court makes its determination.

King participated in an osteopathic residency training program at Oklahoma State University College of Osteopathic Medicine. Hillcrest served as a clinical training site for the program. Drapkin, an osteopathic physician, was a Hillcrest employee. The other individual defendants are osteopathic physicians who were members of Hillcrest's medical staff but not Hillcrest employees.

King's residency was terminated. On March 19, 1997, he filed an action in this judicial district against Hillcrest, Hughes, Ewing, Richard Langerman, Jr., D.O., Smith, Cruse and Jon E. Minter, D.O. *King v. Hillcrest Health Center, Inc.*, No. CIV-97-401-T (*King I*). In *King I*, King sought relief under both federal and state law and he contended that his refusal to participate and engage in certain allegedly fraudulent practices and activities as well as his speech about these matters resulted in the termination of his residency. *King I* was settled in January 1999 and a Stipulation of Dismissal With Prejudice was filed by the parties on February 2, 1999.

In his first amended complaint filed in the instant FCA action,[1] King alleged the defendants, individually

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[1] This case was filed under seal on February 27, 1998. The Court directed the Clerk of the Court to unseal the matter on June 1, 1999. King filed his first amended complaint on July 23,

and as co-conspirators, engaged in nine fraudulent schemes, whereby they submitted or caused to be submitted false claims to the federal government regarding, *inter alia*, medical procedures, treatments and prescriptions. King, as relator, sought relief on behalf of himself as well as the United States of America under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and for unjust enrichment/restitution. He sought to amend this pleading not only by eliminating the unjust enrichment/restitution cause of action and all allegations relating to the allegedly fraudulent scheme involving medical services provided Native Americans but also by asserting additional details about the eight remaining allegedly fraudulent schemes and by clarifying existing ones.

In support of their request for dismissal and their contention that further amendment would be futile, the defendants argued first that this Court lacked subject matter jurisdiction over King's three FCA claims because King did not qualify as an "original source." Although the FCA authorizes individuals to bring actions on behalf of the United States against persons who submit false or fraudulent claims to the federal government, it contains jurisdictional limits on those who may commence such actions. The FCA

> "specifically bars all *qui tam* suits based upon publicly disclosed information unless the person bringing the action is an 'original source' of the information."

1999, and on November 4, 1999, filed his Motion for Leave to File Second Amended Complaint.

United States ex rel. Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1157 (10th Cir. 1999) (citing 31 U.S.C. § 3730(e)(4)(A)).

The term "original source" is defined in the FCA as

> "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an [FCA] action . . . which is based on the information."

Id. § 3730(e)(4)(B).

Therefore, to qualify as an "original source," King

> "must demonstrate: (1) [he had] . . . 'direct and independent knowledge of the information on which the allegations are based,' and (2) [he] . . . 'voluntarily provided such information to the government prior to filing suit.' "

Spectrum, 190 F.3d at 1161 (quoting *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 553 (10th Cir. 1992)).

"Direct and independent knowledge is knowledge 'marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor.' " 190 F.3d at 1162 (quoting *United States ex rel Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996) (other citations and quotation marks omitted)). The phrase " 'information on which the allegations are based' means the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." *Id.* (citation omitted).

In his proposed second amended complaint, King identified eight alleged fraudulent schemes, Schemes A through H, and the Court found that King had sufficiently pled in this proposed pleading that through King's own efforts and first-hand observations, King had direct and independent knowledge of the information on which the allegations regarding each scheme, save Scheme H, were based.

This finding however did not end the Court's inquiry into King's status as an "original source." As required by both statute and case law, to qualify as an "original source," King must also sufficiently have pled that he voluntarily provided the relevant information to the federal government prior to filing the instant lawsuit. 31 U.S.C. § 3730(e)(4)(B).

In his proposed second amended complaint, King alleged that he

> "ha[d] provided to the Attorney General of the United States, and to the United States Attorney for the Western District of Oklahoma, simultaneously with the filing of his original complaint, a statement of all material evidence and information relating to the complaint."[2]

The defendants contested only the timeliness of King's disclosure of information to the government in connection with *King I*. The defendants did not contest the timeliness of

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[2] In his Memorandum of Law filed on November 4, 1999, King alleged that he had "provided detailed information organized in notebooks to the U.S. Attorney in Oklahoma City and to the Department of Justice prior to filing this action."

the distance vis-a-vis the *qui tam* action,[3] and the Court found King had sufficiently alleged for purposes of the pending Motions to Dismiss that he was an "original source" of the information, and that the Court therefore had subject matter jurisdiction over his claims.

The United States has now advised the Court and opposing counsel in its amicus curiae brief that it has no record of King providing any information about the allegations giving rise to this lawsuit prior to February 27, 1998, the date the original complaint was filed. In light of the government's clarification about King's actions, the Court concludes that reconsideration of its Order is necessary to the extent the Court now finds King did not provide the information on which the allegations in the *qui tam* action are based prior to filing the FCA action. King therefore does not qualify as an "original source," and, consequently, this action is barred. *E.g., Spectrum,* 190 F.3d at 1157 (FCA specifically bars all *qui tam* actions based on publicly disclosed information unless person bringing action was "original source" of information).

Accordingly, under the present facts and circumstances, the Court

(1) VACATES its Order of January 4, 2000; and

(2) hereby DISMISSES this matter for lack of subject matter jurisdiction.[4] Rule 12(h)(3), F.R.Civ.P.

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[3] The defendants argued that King was required to disclose the information to the federal government prior to filing *King I.*

[4] The defendants also argued in support of their request for dismissal and in opposition to King's request to amend that this lawsuit was barred by the doctrine of res judicata. In this circuit,

ENTERED this 29th day of February, 2000.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 2-29-00

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three factors must be present before the doctrine applies, *e.g.*, *Yapp v. Excel Corporation*, 186 F.3d 1222, 1226 (10th Cir. 1999), and since res judicata is an affirmative defense, the defendants had the burden of setting forth sufficient facts to show each factor. *Id.*

It was undisputed that the first factor – judgment on the merits in the initial lawsuit – was present: the Stipulation of Dismissal With Prejudice operated as a judgment on the merits in *King I*. The Court likewise found there was no dispute as to the second factor since King did not challenge the defendants' argument that the parties in the two lawsuits were either identical or in privity with one another. The parties did disagree about the third factor, and the Court found an identity of causes of action in *King I* and in the instant FCA action. Having found proof of all three factors, the Court held that the doctrine of res judicata barred litigation of this lawsuit.

In his Motion to Reconsider or to Alter or Amend Judgment, King has contended that the Court erred in finding an identity of parties as well as finding an identity of causes of action in the two lawsuits. Because the Court has vacated its Order of January 4, 2000, and has now dismissed the action for lack of subject matter jurisdiction, the Court has not reconsidered the parties' arguments and authorities regarding the doctrine of res judicata.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA ex rel. JOHN A. KING, D.O., Plaintiff, vs. HILLCREST HEALTH CENTER, INC., et al., Defendants.	)	No. CIV-98-295-W

ORDER

(Filed April 11, 2000)

This matter came before the Court on the Motions to Dismiss filed by defendants Glenn L. Smith, D.O., Raymond Dieter, D.O., Mona Motz, D.O., Joe Goldstein, D.O., Tom W. Ewing, D.O., Anthony L. Cruse, D.O., Richard J. Langerman, Sr., D.O., John B. Hughes, D.O., Hillcrest Health Center, Inc. and Harvey Drapkin, D.O. Plaintiff, John A. King, D.O., not only responded to the motions but also moved the Court for leave to file a second amended complaint. All defendants, save Smith and Dieter, objected to King's request to amend. Based upon the record, the Court on January 4, 2000, denied King's Motion for Leave to File Second Amended Complaint and granted the defendants' Motions to Dismiss on the grounds this action was barred by the doctrine of res judicata.

The matter then came before the Court on King's Motion to Reconsider or to Alter or Amend Judgment

filed pursuant to Rule 59, F.R.Civ.P. All defendants responded in opposition to the motion. The United States of America filed an amicus curiae brief, and the Court invited the parties of file responses "to the arguments, authorities and statements contained therein." Order of February 24, 2000. The defendants responded; King did not. Upon review of these submissions, and particularly, the government's statements regarding King's alleged disclosure of information to the United States about the allegations giving rise to this lawsuit,[1] the Court determined that reconsideration of its Order was necessary. The record revealed that King had not provided the relevant information prior to filing his complaint under the qui tam provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. Thus, King did not qualify as an

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[1] In his complaint, King wrote:

> "As required by 31 U.S.C. § 3730(b)(2), plaintiff has provided to the Attorney General of the United States, and to the United States Attorney for the Western District of Oklahoma, simultaneously with the filing of this complaint, a statement of all material evidence and information relating to the complaint."

Complaint (February 27, 1998) at 3-4; *see also* First Amended Complaint (July 23, 1999) at 2-3.

In his Memorandum of Law filed on November 4, 1999, King alleged that he had "provided detailed information organized in notebooks to the U.S. Attorney in Oklahoma City and to the Department of Justice prior to filing this action."

In its amicus curiae brief, the United States wrote:

> "The United States notifies the Court that it has no record of the relator providing any information to the government on which the allegations in the qui tam are based at any time prior to February 27, 1998, the date the complaint was filed."

"original source," *id.* § 3730(e)(4), and his action was therefor barred. *E.g., United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1157 (10th Cir. 1999) (FCA specifically bars all qui tam actions based on publicly disclosed information unless person bringing action was "original source" of information). Accordingly, the Court on February 29, 2000, vacated its Order of January 4, 2000,[2] and dismissed the matter for lack of subject matter jurisdiction. Rule 12(h)(3), F.R.Civ.P.

The matter now comes before the Court on King's Motion to Reconsider or to Alter or Amend Judgment filed pursuant to Rule 59, F.R.Civ.P. In this submission, King has challenged the government's allegations regarding the timeliness and extent of his disclosure. All defendants have responded to King's arguments and authorities, the United States has filed another amicus curiae brief and King has filed a reply. Based upon the record in its entirety, the Court finds the relief requested by King is not warranted. Accordingly, the Court DENIES King's Motion to Reconsider or to Alter or Amend Judgment filed on March 13, 2000.

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[2] In his Motion to Reconsider or to Alter or Amend Judgment, King contended that the Court erred in finding the action was barred by the doctrine of res judicata. Because the Court vacated its Order of January 4, 2000, and dismissed the action for lack of subject matter jurisdiction, the Court did not reconsider the parties' arguments and authorities regarding this doctrine.

ENTERED this 11th day of April, 2000.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN A. KING, D.O., United States of America, ex rel, Plaintiff-Appellant, v. HILLCREST HEALTH CENTER, INC.; HARVEY DRAPKIN, D.O.; JOHN B. HUGHES, D.O.; RICHARD J. LANGERMAN, SR., D.O.; TOM W. EWING, D.O.; ANTHONY L. CRUSE, D.O.; RAYMOND DIETER, D.O.; MONA MOTZ, D.O.; GLENN L. SMITH, D.O.; JOE GOLDSTEIN, D.O., Defendants-Appellees.	No. 00-6158

ORDER

Filed October 1, 2001

Before Circuit Judges [sic]. **BRISCOE, MURPHY,** and **CROW***, District Court Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Lisa Gallegos
Deputy Clerk

* The Honorable Sam A. Crow of the United States District Court for the District of Kansas, sitting by designation.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 01-956

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. JOHN A. KING, D.O.,
Petitioner,
v.
HILLCREST HEALTH CENTER, INC.,
HARVEY DRAPKIN, D.O., JOHN B. HUGHES, D.O.,
RICHARD J. LANGERMAN, SR., D.O.,
TOM W. EWING, D.O., ANTHONY L. CRUSE, D.O.,
RAYMOND DIETER, D.O., MONA MOTZ, D.O.,
GLENN J. SMITH, D.O., AND JOE GOLDSTEIN, D.O.,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

A. SCOTT JOHNSON
MARY B. HANAN
JOHNSON, HANAN AND HERON
Bank One Center
100 N. Broadway Ave., Suite 2750
Oklahoma City, OK 73102
405-232-6100

DONALD B. AYER
(*Counsel of Record*)
GREGORY M. LUCE
JESSE A. WITTEN
KATHLEEN M. LAUBENSTEIN
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202-879-3939

Counsel for HILLCREST HEALTH CENTER, INC. and
HARVEY DRAPKIN, D.O.

(Additional Counsel Listed Inside Cover)

28 pp

EDWARD A. GOLDMAN
416 NW 23rd Street
Oklahoma City, OK 73103
405-524-3403

Counsel for JOHN B. HUGHES, D.O.

KEVIN DRISKILL
DRISKILL & JONES
2350 Bank One Center
100 North Broadway
Oklahoma City, OK 73102
405-272-9700

Counsel for TOM W. EWING, D.O. and MONA MOTZ, D.O.

RANDALL K. CALVERT
6520 N. Western, Suite 100
Oklahoma City, OK 73116
405-848-5000

Counsel for RAYMOND DIETER, D.O. and GLENN J. SMITH, D.O.

RICK L. DENKER
DENKER & BUTLER, PLLC
4700 N.W. 23rd Street, Suite 112
Oklahoma City, OK 73127
405-946-5533

Counsel for RICHARD J. LANGERMAN, SR., D.O.

JOHN N. HERMES
M. RICHARD MULLINS
MCAFEE & TAFT
211 North Robinson, 10th Floor
Oklahoma City, OK 73102
405-235-9621

Counsel for ANTHONY L. CRUSE, D.O.

HILTON H. WALTERS
RIFE & WALTERS
Bank One Center, Suite 2730
Oklahoma City, OK 73102
405-235-3800

Counsel for JOE GOLDSTEIN, D.O.

QUESTIONS PRESENTED

1. Whether the jurisdictional limitation of 31 U.S.C. § 3730(e)(4)(A), which requires a False Claims Act relator to show he is an "original source" if his *qui tam* complaint is "based upon" a prior "public disclosure," applies where the allegations of the complaint are substantially identical to the information in the public disclosure, but were not actually derived by relator from that public disclosure.

2. Whether a relator fails to satisfy the pre-filing voluntary disclosure requirement of the False Claims Act's "original source" definition, 31 U.S.C. § 3730(e)(4)(B), when the relator deliberately withholds from the government both his own identity and the identity of the alleged perpetrators of the fraud.

PARTIES TO THE PROCEEDINGS

Hillcrest Health Center, Inc., now known as St. Michael Hospital, Inc., is a not-for-profit corporation organized under the laws of Oklahoma. SSM Health Care of Oklahoma, Inc., an Oklahoma not-for-profit corporation, is the sole member of St. Michael Hospital, Inc. SSM Health Care Corporation, a Missouri nonprofit corporation, is the sole member of SSM Health Care of Oklahoma, Inc.

The remaining respondents are all individuals.

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Petitioner, Dr. John A. King, is a *qui tam* relator whose False Claims Act complaint against respondents[1] was dismissed by the district court under the public disclosure/original source provisions of the Act, 31 U.S.C. § 3730(e)(4). That dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit, and petitioner now seeks review by this Court. He claims that this case, on the record as developed in the courts below, presents two questions of interpretation of the False Claims Act on which the courts of appeals are divided.

One of the two asserted issues, concerning the meaning of "based upon" in § 3730(e)(4)(A), is in fact the subject of a well-developed split in the circuits. It is, however, a matter of little practical consequence upon which this Court has already denied certiorari at least five times since a conflict arose. In addition, it was expressly held to be waived by the court below, and that conclusion is clearly correct. Petitioner never raised this issue in any form in the district court, not even in a footnote in his principal brief, or in either of the two petitions for reconsideration that he filed there.

The other claimed conflict among the circuits, concerning the voluntary disclosure requirement of § 3730(e)(4)(B) that must be satisfied in order to qualify as an original source, is wholly imaginary. Here, Dr. King argues he made the required voluntary disclosure, even as he withheld from the government both his own identity and that of the supposed perpetrators of the alleged fraud. No case from any circuit remotely suggests that the Tenth Circuit's rejection of this unappealing contention was incorrect.

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[1] This brief in opposition is submitted on behalf of all defendants named in that complaint: Hillcrest Health Center, Inc., Harvey Drapkin, D.O., John B. Hughes, D.O., Richard J. Langerman, Sr., D.O., Tom W. Ewing, D.O., Anthony L. Cruse, D.O., Raymond Dieter, D.O., Mona Motz, D.O., Glenn J. Smith, D.O., and Joe Goldstein, D.O.

COUNTERSTATEMENT

Respondents offer this counterstatement, in order to address relevant facts and procedural history omitted or misstated in the Petition.

On March 19, 1997, Dr. King filed a retaliatory discharge action ("*King I*"), alleging that certain of the respondents retaliated against him for complaining about Medicare fraud and for his refusal to participate in these fraudulent schemes. That action was settled by the parties and dismissed with prejudice in February 1999. (Pet. App. 2a.)

In November 1997, Dr. King's attorney, Mr. Loegering, met with the United States Attorney's Office, and provided information about several allegedly fraudulent schemes. (Pet. App. 7a.) In the course of that meeting, and at all times prior to filing of Dr. King's *qui tam* complaint, Dr. King and his lawyer declined to provide to the government Dr. King's identity or the identities of the potential defendants, or any written material.

While *King I* was still pending, on February 27, 1998, petitioner filed under seal the present *qui tam* action against respondents alleging Medicare fraud. (Pet. App. 3a.) Petitioner now states that the complaint was filed "along with a 'written disclosure of substantially all material evidence and information' he possessed." (Pet. 3 (quoting 31 U.S.C. § 3730(b)(2)).) This statement is demonstrably incorrect. *See infra* at 4. It repeats one made in petitioner's First Amended Complaint, to the effect that "plaintiff ha[d] provided to the Attorney General of the United States, and the United States Attorney for the Western District of Oklahoma, *simultaneously with* the filing of this complaint, a statement of

all material evidence and information relating to the complaint." (A18-A19 (emphasis added).)[2]

The United States declined to intervene in Dr. King's *qui tam* action, and the complaint was unsealed and served on respondents in June of 1999. (Pet. App. 3a.) Respondents filed separate motions to dismiss, asserting both (i) that the district court lacked subject matter jurisdiction over the complaint because the allegations upon which it was based had been publicly disclosed in *King I*, and (ii) that the action was barred under the doctrine of *res judicata*, based on the resolution of *King I*. (Pet. App. 3a.)

At no time in the district court did petitioner assert the argument now offered as the first question for this Court's review — that the statute's bar to jurisdiction of actions "based upon the public disclosure" only applies where relator's *qui tam* allegations were actually derived from the public disclosure. Instead, he argued that he satisfied the "original source" exception to that jurisdictional bar. (*See, e.g.*, A245-A254.) The district court, relying on petitioner's untrue assertions that he had provided the information to the government before the complaint was filed, ruled that he satisfied the requirements to be an original source. (*See* Pet. App. 3a-4a.) However, the court nonetheless ordered the case dismissed, on the ground that petitioner's complaint was barred on *res judicata* grounds as a result of the dismissal with prejudice of *King I*. (Pet. App. 4a.)

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[2] In his district court brief in opposition to respondents' motions to dismiss, Dr. King alleged both that he provided this material to the government "*simultaneously with* instituting the instant action," and "*prior to*" filing the action. (A245, A248 (emphasis added).) Both statements are false.

References to the Appellant's Appendix filed in the United States Court of Appeals for the Tenth Circuit are designated as A__.

Petitioner moved for reconsideration under Fed. R. Civ. P. 59(e). On February 8, 2000, the United States filed an *amicus curiae* brief, supporting petitioner on the *res judicata* issue, but stating that it had "no record of the relator providing any information to the government on which the allegations in the *qui tam* are based at any point prior to February 27, 1998, the date the complaint was filed." (Pet. App. 4a.)

The district court issued an order on February 14, 2000 inviting all parties to respond to the "arguments, authorities, and statements" raised in the government's *amicus* brief. (Pet. App. 4a.) Petitioner filed no response to the government's allegations. (*Id.*) On February 29, the district court dismissed the action for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) and vacated its prior order based on *res judicata* grounds. (Pet. App. 5a.)

Petitioner next filed a motion for reconsideration of the district court's February 29 order. Petitioner attached to this motion a copy of a letter transmitting written materials about his fraud allegations to the United States Attorney's Office. This letter was dated March 3, 1998 — four days *after* the complaint was filed on February 27. (A397-A398.) Confronted with this discrepancy, petitioner acknowledged that he had "inadvertently misstated that 'Dr. King provided detailed information organized in notebooks to the U.S. Attorney in Oklahoma and the Department of Justice prior to filing this action,' and 'simultaneously with the filing.'" (A435.) Petitioner's counsel asserted, however, that he had orally provided some information to the government at the November 1997 meeting and that he had offered to provide additional information and to make his client available for an interview. (Pet. App. 6a-7a.)

In response, the United States Attorney's Office filed an affidavit from Assistant U.S. Attorney Cox detailing the November 1997 meeting with Mr. Loegering. (Pet. App. 7a.) AUSA Cox stated that the meeting was "general in nature, on

a no-name basis," with "an actual proffer" to come at some future point. (*Id.*) As petitioner's counsel has acknowledged, no such proffer occurred before the *qui tam* complaint was filed. On April 9, 2000, the district court denied petitioner's second motion for relief under Rule 59(e).

On appeal, the Tenth Circuit affirmed the district court's dismissal on subject matter jurisdiction grounds. The court first determined that petitioner had failed, in the district court, to contest whether *King I* constituted a public disclosure and whether his *qui tam* complaint was based upon that public disclosure:

> King essentially conceded both issues when he jumped past these issues and argued only that he qualified as an original source in opposing the defendants' original motions to dismiss.[3]

(Pet. App. 11a.) The Tenth Circuit went on to hold that, "even assuming that one or all of these issues had been timely raised before the district court," (Pet. App. 11a), under *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), *King I* constituted a public disclosure, and the *qui tam* action was

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[3] The Tenth Circuit noted that, in a footnote, the relator had cited the district court to two out-of-circuit district court cases said to hold that the public disclosure bar did not arise from prior litigation, but also to the Tenth Circuit's contrary decision in *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), which he made no effort to distinguish. (Pet. App. 11a.)

Petitioner's discussion to which the Tenth Circuit referred was located in a footnote within a section of petitioner's opposition to the motion to dismiss headed "Dr. King is An 'Original Source' And The Court Has Subject Matter Jurisdiction" and sub-headed "Dr. King Properly Provided Information To The Government Before Filing This Action." (A245.) At no point in that or any other district court filing did petitioner assert the narrow definition of "based upon the public disclosure" on which he now asks this Court to grant certiorari.

based upon it because "its allegations share a substantial identity with the allegations in" that case. Accordingly, the court held that the public disclosure bar applied. (Pet. App. 11a-12a.)

Finally, the court held that, because Dr. King had deliberately withheld his own identity and that of the potential defendants from the government before he filed his complaint, he did not qualify as an original source under section 3730(e)(4)(B) and therefore the district court lacked jurisdiction. (Pet. App. 12a-16a.)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI ON THE ISSUE CONCERNING THE MEANING OF "BASED UPON" UNDER 31 U.S.C. § 3730(e)(4)(A) BECAUSE IT DOES NOT MERIT REVIEW AND BECAUSE THE PETITIONER WAIVED THE ARGUMENT BELOW

A. This Issue is of Limited Practical Consequence, and this Court has Denied Certiorari in at Least Five Cases Since a Conflict in the Circuits Arose

Since 1994, there has been a split in the circuits over the proper interpretation of the term "based upon" in 31 U.S.C. § 3730(e)(4)(A).[4] While the split is clear, it is one whose

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[4] Presently, nine circuits hold that qui tam allegations are "based upon" a public disclosure if those allegations are "supported by" or "substantially identical" to the information that was publicly disclosed. *See Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, __ F.3d __, 2002 WL 59279, at *11-*12 (8th Cir. 2002); *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539-40 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999); *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *United States ex rel. Findley v.*

consequences are quite limited. For reasons explained more fully below, there is no compelling reason for this Court to grant review of this issue, either now or ever. Not surprisingly, since 1994, in at least five cases, this Court has denied petitions for certiorari which squarely presented this issue and highlighted the existence of a conflict. *See* Petition for Certiorari, *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, No. 99-969, at 16-23 (U.S. Dec. 8, 1999), *cert. denied*, 529 U.S. 1018 (2000); Petition for Certiorari, *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, No. 98-1268, at 9-17 (U.S. Jan. 28, 1999), *cert. denied*, 526 U.S. 1066 (1999); Petition for Certiorari, *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, No. 97-850, at 11-16 (U.S. Nov. 21, 1997), *cert. denied*, 522 U.S. 1077 (1998); Petition for Certiorari, *United States ex rel. Findley v. FPC-Boron Employees' Club*, No. 97-157, at 6-10 (U.S. June 16, 1997), *cert. denied*, 522 U.S. 865 (1997); Petition for Certiorari, *United States ex rel.*

FPC-Boron Employees' Club, 105 F.3d 675, 682-84 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997); *Fed. Recovery Serv., Inc., v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

Two circuits take the view that qui tam allegations must actually be "derived from" the public disclosure in order to be "based upon" it for purposes of the public disclosure bar. *United States v. Bank of Farmington*, 166 F.3d 853, 863-64 (7th Cir. 1999); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-48 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994).

The decision below does nothing to deepen or extend this conflict. It simply applies, as an alternative basis for dismissal and without elaboration, the decision of the Tenth Circuit in *Precision*, 971 F.2d at 552-54, which was among the first appellate cases to address the issue following the section's enactment in 1986.

Siller v. Becton Dickinson & Co., No. 94-106, at 12-15 (U.S. July 15, 1994), *cert. denied*, 513 U.S. 928 (1994).

Where a suit is found to be "based upon [a] public disclosure," in order to proceed, the relator must then establish himself as an "original source" — that is, show himself to have "direct and independent knowledge of the information" on which the suit is based, and to have "voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4). Thus, the narrower concept of "based upon" advocated by petitioner, which imposes the public disclosure bar only where a relator's information is actually "derived from" the public disclosure, triggers the original source requirement in a relatively narrow class of cases. The majority rule, applied below, which finds suits to be "based upon the public disclosure" whenever the suit's allegations are supported by or substantially identical to the public disclosure — regardless of where relator learned of them — imposes the "original source" requirement in a larger proportion of cases. In both instances, though, any party who can show both direct and independent knowledge, and the required voluntary disclosures to the government, is allowed to go forward. Only persons unable to do so are foreclosed.

Thus, if the position of nine courts of appeals, including the Tenth Circuit here, is correct, the "derived from" interpretation of "based upon" accepted in the Fourth and Seventh Circuits is incorrect. Such an error, if it be, in the law of the Fourth and Seventh Circuits *may* mean that relators in a handful of cases are being improperly allowed to proceed, when they should have been barred unless they prove direct and independent knowledge and make the required pre-filing voluntary disclosure. On the other hand, if the rule followed below — and in the great majority of circuits — is wrong, then too many relators in too many cases in these circuits are being required to show that they are an original source. And a few, who cannot make that showing, *may* have their cases thrown out of court. But this theoretical group of ultimately-

affected relators is substantial neither in number nor in the equities of their position. The inability to show that one is an original source means that he either lacks direct and independent knowledge of the information in the complaint, or failed to share it with the government in a timely manner. Given the purposes of the False Claims Act — to provide incentives to true whistleblowers and to bar parasitic lawsuits, *see, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) — the theoretical possibility that a few such relators could be foreclosed does not merit this Court's attention.

The Court's persistent decision to deny review of this issue in the face of a conflict is unsurprising for other reasons as well. First, the substantive rights of the real parties in interest — the United States and the defendants — will not be affected by the resolution of this issue. The United States reviews all False Claims Act complaints before they are served, and is still able to intervene in cases and prosecute actions in which the district court is found to lack subject matter jurisdiction over the relator's claim because of the public disclosure bar. *See, e.g., Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) ("The United States may properly intervene in a suit by a putative source regardless of jurisdictional failures in the underlying suit."); 31 U.S.C. § 3730(c)(3) (where government does not initially intervene, it may intervene at any time during pendency of suit, upon a showing of good cause). Similarly, the substantive provisions of the False Claims Act — and the concomitant obligations of government contractors — are unaffected no matter which definition of "based upon" is correct.

In addition, the existing conflict on the meaning of "based upon" is just one of many that now exist in the circuit courts, relating to the complex and ambiguous provisions of the False Claims Act. Respondents' thorough but perhaps not exhaustive research reveals a number of significant issues on

which various circuits have taken contrary positions.[5] A number of such issues deal with matters of substantive consequence to the rights of defendants and of the United States, such as what constitutes a violation of the Act, and what rights the United States has to control a suit in which it does not intervene:

1. Whether municipalities, counties and other governmental entities which are not arms of the state may be liable under the False Claims Act after this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783-84 (2000);[6]

2. Whether there must be proof of financial loss to the government to support a claim under the False Claims Act;[7]

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[5] The following list excludes several conflicts, of continuing though limited relevance, in interpretation of the Act's provisions as they existed prior to the 1986 amendments.

[6] *Compare United States ex rel. Dunleavy v. County of Del.*, No. 00-3691, 2002 WL 111365, at *6 (3d Cir. Jan. 29, 2002) (holding that local government cannot be subject to suit under False Claims Act because Act mandates punitive damages); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 491-92 (5th Cir. 2001) (holding that counties and local government entities are not "persons" under the FCA and, therefore, not subject to liability under the FCA), *cert. denied*, 122 S. Ct. 808 (2002), *with United States ex rel. Chandler v. Cook County, Ill.*, Nos. 00-4110, 01-1810, 2002 WL 75859, at *10 (7th Cir. Jan. 22, 2002) (holding that counties are "persons" under FCA and subject to same penalties as other defendants).

[7] *Compare Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3rd Cir. 2001) (holding that liability does not attach under the FCA unless a false claim would result in economic loss to the government), *with Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001) (holding that government can recover statutory penalties under the FCA even if no actual economic loss is proven); *Commercial Contr., Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir. 1998) (same); *United States v. Rivera*,

3. Whether the subject matter of a false statement must be the actual source of the government's loss or whether a "but for" relationship is sufficient to permit recovery for damages in a false certification case;[8]

4. Whether an implied certification of regulatory compliance can constitute a basis for liability;[9]

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55 F.3d 703, 709 (1st Cir. 1995) (same); *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966) (same) *and with Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4th Cir. 1999) (no requirement that government suffer economic loss); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995) (same), *vacated on other grounds*, 520 U.S. 939 (1997).

[8] *Compare United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995) (holding that the subject matter of the false statement must be the source of the government's loss); *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983) (same); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977) (same); *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 62-63 (8th Cir. 1973) (same), *with United States v. First Nat'l Bank of Cicero*, 957 F.2d 1362, 1374 (7th Cir. 1992) (holding that a "but for" relationship between the false statement and the government's damages is sufficient); *United States v. Ekelman & Assoc.*, 532 F.2d 545, 550-51 (6th Cir. 1976) (same).

[9] *Compare Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (1994) (holding that implied certification can constitute the basis for FCA liability), *aff'd without opinion*, 57 F.3d 1084 (Fed. Cir. 1995); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531-33 (10th Cir. 2000) (same), *with United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996) (holding that no FCA liability exists unless an express false certification is made); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (same).

5. Whether the government can block a settlement in a False Claims Act case in which it did not intervene;[10] and

6. Whether the general statute of limitations under the False Claims Act applies to retaliation claims brought under the Act.[11]

Other circuit conflicts currently exist on various issues relating to the ambiguous provisions of the public disclosure/original source rules:

7. Whether information revealed to corporate employees or learned during a corporate internal investigation constitutes a public disclosure;[12]

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[10] *Compare United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (holding that if the government chooses not to intervene it cannot later block settlement), *with Searcy v. Philips Elec. N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (holding that the government can block a settlement even if it did not intervene); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) (holding that the government can block a relator's voluntary dismissal even if it did not intervene).

[11] *Compare Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994) (holding that FCA statute of limitations applies), *with United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 & n.4 (9th Cir. 1998) (applying closest state statute of limitations).

[12] *Compare Doe v. John Doe Corp.*, 960 F.2d at 322-23 (holding that disclosure to corporate employee is public disclosure), *with Schumer*, 63 F.3d at 1518 (holding that disclosure to corporate employee is not public disclosure); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 n.4 (10th Cir. 1996) (same).

8. Whether unfiled discovery materials can constitute a "public disclosure;"[13]

9. Whether the list of ways in which a public disclosure may occur under section 3730(e)(4)(A) is exclusive;[14]

10. Whether a relator must have had a hand in the public disclosure in order to be an original source;[15] and

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[13] *Compare United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) (holding that discovery material which is only theoretically available is not publicly disclosed); *Ramseyer*, 90 F.3d at 1519 (same); *Springfield Term. Ry.*, 14 F.3d at 652 (same), *with United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (holding that information disclosed during discovery is publicly disclosed).

[14] *Compare United States ex rel. Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999) (holding that list is exclusive); *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999) (same); *United States ex rel.Dunleavv v. County of Del.*, 123 F.3d 734, 744 (3d Cir. 1997) (same); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513 n.2 (8th Cir. 1994) (same); *Doe v. John Doe Corp.*, 960 F.2d at 323 (same); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991) (same); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990) (same), *with A-1 Ambulance v. Cal.*, 202 F.3d 1238, 1244 (9th Cir.) (broadly interpreting list), *cert. denied*, 529 U.S. 1099 (2000); *United States ex rel. Fine v. Advanced Sci., Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) (same).

[15] *Compare United States ex rel. Dhawan v. N.Y. Med. College*, 252 F.3d 118, 121 (2d Cir. 2001) (holding that the *qui tam* plaintiff must have had hand in public disclosure); *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (same), *with Bank of Farmington*, 166 F.3d at 865 (holding that *qui tam* plaintiff need not be source of public disclosure); *Siller*, 21 F.3d at 1351 (same); *Fine*, 99 F.3d at 1007 n.5 (same); *Cooper*, 19 F.3d at 568 n.13 (same); *Findley*, 105 F.3d at 690 (same).

11. Whether a relator must have revealed the allegations to the government before the public disclosure in order to be an original source.[16]

For the reasons set forth above, the conflict over the proper interpretation of the term "based upon" is far from the most important of those that now exist under the Act. It can certainly wait until the Court takes up some of the more substantive conflicts that have arisen under the Act, during which time the issue may already have been resolved by the actions of the minority circuits or comments in this Court's opinions.

B. As the Tenth Circuit Held, the Issue was Waived in the District Court

Entirely apart from the foregoing discussion, certiorari should be denied because the "based upon" issue was not raised in the district court, and was therefore waived. The Tenth Circuit expressly so concluded. It stated that petitioner "essentially conceded [this and another issue] when he jumped past these issues and argued only that he qualified as an original source in opposing defendants' original motions to dismiss." (Pet. App. 11a (footnote omitted).) *See also United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) (relator waived argument supporting jurisdiction over *qui tam* action). That conclusion is clearly correct, as the "based upon" issue was never raised at any time, in any form, in the district court, notwithstanding ample opportunity to do so. The court thus held that the issue had not been preserved for review, but, in any event, went on to conclude that petitioner's interpretation of the "based upon"

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[16] *Compare Findley*, 105 F.3d at 690-91 (holding that relator must disclose allegations to government before public disclosure to qualify as original source); *McKenzie*, 123 F.3d at 943 (same), *with Minnesota Ass'n of Nurse Anesthetists*, 2002 WL 59279, at *14 (rejecting additional requirement that relator provide information to government before public disclosure).

language was contrary to the Tenth Circuit's binding precedent in *Precision.*

This Court should decline review for this reason as well.

II. THIS COURT SHOULD DENY CERTIORARI ON THE QUESTION WHETHER A RELATOR QUALIFIES AS AN "ORIGINAL SOURCE" UNDER 31 U.S.C. § 3730(e)(4)(B) WHEN, IN HIS PRE-FILING VOLUNTARY DISCLOSURE, HE DELIBERATELY WITHHELD FROM THE GOVERNMENT HIS IDENTITY AND THE IDENTITY OF THE ACCUSED

A. There is no Conflict in the Circuits

On his second question presented, relating to the requirements of the voluntary disclosure prong of the original source provisions, 31 U.S.C. § 3730(e)(4)(B), petitioner attempts to conjure up a circuit split by misstating the holding of the court below and contrasting it with a mischaracterization of the D.C. Circuit's decision in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d at 657.

He states, first, that the Tenth Circuit has imposed on relators a "total disclosure" rule, meaning, he claims, that "the Tenth Circuit ruled that '*the information*' to be provided under section 3730(e)(4)(B) means all the information the relator possesses." (Pet. 12 (emphasis in original).) In fact, in its own words, the Tenth Circuit decided the narrower question "whether a relator qualifies as a 'source' if in making his pre-filing disclosure he withholds his identity and the identities of the potential defendants." (Pet. App. 14a-15a.) The court below reasoned that the obligation to voluntarily disclose "the essential elements or information on which the qui tam allegations are based" (Pet. App. 14a) clearly extends to "[t]he identities of the accuser and the accused . . . ." (Pet. App. 15a.) It therefore concluded that petitioner's failure to provide his identity or that of the accused to the government

"kept him from meeting the jurisdictional requirements of an original source." (Pet. App. 16a (footnote omitted).) The court below never referred to a "total disclosure" rule, although petitioner uses those words at least ten times in his petition to characterize the court's holding.

Relator seeks to contrast the decision below with the holding of the D.C. Circuit in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d at 657. But the *Springfield Terminal* case in no way suggested that a relator could be an "original source" while deliberately withholding critically relevant information known to him, such as his or the potential defendants' identities. In fact, *Springfield Terminal* does not address the pre-filing voluntary disclosure requirement at all. Instead, the D.C. Circuit found that "§ 3730(e)(4)(B) does not require that the *qui tam* relator *possess* direct and independent knowledge of all of the vital ingredients to a fraud transaction." *Id.* at 656-57 (emphasis added). Because the relator there possessed direct and independent knowledge of an essential element of the fraud transaction, though not of the entire fraud scheme, the court found that the original source requirement was satisfied. *Id.* at 657. That decision is consistent with the decision below in all respects.

B. The Tenth Circuit's Application of the Voluntary Disclosure Requirement is Clearly Correct

Notably absent from petitioner's argument is a sound rationale for why a relator should be permitted to withhold such crucial information and still satisfy the voluntary disclosure prong of the original source requirement. The primary purpose of the False Claims Act is "encouraging disclosure and aiding prosecution of fraud on the government." *Mistick*, 186 F.3d at 391. That purpose is ill-served by petitioner's unsupported suggestion that he can satisfy the statute while holding his cards close to his vest and withholding information as to identity that is essential to the

government's ability to dig deeper. As the Tenth Circuit recognized (Pet. App. 15a), petitioner's failure to provide this critical information to the government hampered its ability to investigate these allegations, since it was unable to focus on any particular target of investigation or assess the reliability of what it had been told. That withholding of information thus thwarted the primary objective of the False Claims Act.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

February 1, 2002

DONALD B. AYER
(*Counsel of Record*)
GREGORY M. LUCE
JESSE A. WITTEN
KATHLEEN M. LAUBENSTEIN
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202-879-3939

A. SCOTT JOHNSON
MARY B. HANAN
JOHNSON, HANAN AND HERON
Bank One Center
100 N. Broadway Avenue
Suite 2750
Oklahoma City, OK 73102
405-232-6100

Counsel for Respondents
HILLCREST HEALTH CENTER, INC. and HARVEY DRAPKIN, D.O.

EDWARD A. GOLDMAN
416 NW 23rd Street
Oklahoma City, OK 73103
405-524-3403

Counsel for Respondent
RICHARD J. LANGERMAN, SR., D.O.

KEVIN DRISKILL
DRISKILL & JONES
2350 Bank One Center
100 North Broadway
Oklahoma City, OK 73102
405-272-9700

Counsel for Respondents
TOM W. EWING, D.O.
and MONA MOTZ, D.O.

RANDALL K. CALVERT
6520 N. Western, Suite 100
Oklahoma City, OK 73116
405-848-5000

Counsel for Respondents
RAYMOND DIETER, D.O.
and GLENN J. SMITH, D.O.

RICK L. DENKER
DENKER & BUTLER, PLLC
4700 N.W. 23rd Street
Suite 112
Oklahoma City, OK 73127
405-946-5533

Counsel for Respondent
JOHN B. HUGHES, D.O

JOHN N. HERMES
M. RICHARD MULLINS
MCAFEE& TAFT
211 North Robinson, 10th Fl.
Oklahoma City, OK 73102
405-235-9621

Counsel for Respondent
ANTHONY L. CRUSE, D.O.

HILTON H. WALTERS
RIFE & WALTERS
Bank One Center, Suite 2730
Oklahoma City, OK 73102
405-235-3800

Counsel for Respondent
JOE GOLDSTEIN, D.O.

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UNITED STATES OF AMERICA, ex rel.
JOHN A. KING, D.O.,

Petitioner,

versus

HILLCREST HEALTH CENTER, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY

DAVID J. SCHENCK
Counsel of Record
STANFORD PURSER
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF REPLY

Respondents urge that the conflict among eleven Circuits over Congress' intended meaning of the term "based upon" is "one whose consequences are quite limited." Opp. Brief at 6-7. Quite to the contrary, a division as wide as this one is highly significant especially where, as here, it operates to bar claims of fraud against the United States and to create a disincentive to make the fraud known. This is all the more true where, as in the Tenth Circuit, parallel language of the same section has been read to exacerbate the problem. Also, contrary to Respondents' assertions, the Tenth Circuit reading of the original source disclosure provisions in this case would require disclosure of all the relator's "information" in conflict with the District of Columbia Circuit, the language of the Act and the recognized intentions of Congress.

Finally, for unknown reasons, Respondents also appear to accuse Petitioner of misrepresenting the fact that he complied with 31 U.S.C. § 3730(b)(2), the provision outlining filing and service requirements for relators.[1] Opp. Brief at 2. Respondents' accusation is in error

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[1] That section requires the relator to file the complaint under seal and to serve a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses . . . on the Government." 31 U.S.C. § 3730(b)(2). Petitioner more than satisfied this requirement when he timely and undisputedly served the Government with his complaint and simultaneously served additional information "organized in notebooks" for the Government's convenience. *E.g.*, Appellant's App. before the Tenth Circuit at 435. That fact is undisputed and undoubtedly

and totally irrelevant, as it is undisputed that Petitioner complied with this section.[2] Indeed, the issue was never considered below and is not raised here on certiorari.

In all events, it is undisputed that the disclosure under 3730(b)(2) was proper and timely and no question concerning compliance with that section was considered below or raised here. Thus, the *ad hominen* is totally irrelevant and serves only to waste the Court's time.

REPLY

I. The Conflict in the Circuits Regarding the Meaning of "Based Upon" Under 31 U.S.C. § 3730(e)(4)(A) Is Important And Should Not Be Ignored

A. The *Qui Tam* Provisions of the FCA Play an Integral Part in Achieving the Act's Purpose – to Combat Fraud – and Their Interpretation Is Not of Limited Consequence.

Notwithstanding the fact that Congress chose the language and had a purpose in mind undeniably at odds

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known to Respondents, as they selectively quote the same page of Appellant's Appendix later in their Counterstatement.

[2] Thus, to the extent Respondents assert that Petitioner did not timely provide the necessary parties with "a 'written disclosure of substantially all material evidence and information' he possessed" or otherwise comply with the service requirements, they are knowingly wrong. Pet. Brief at 3 (quoting 31 U.S.C. § 3730(b)(2)). Rather, it would appear that Respondents are referring to an earlier erroneous statement, long ago corrected in the District Court, to the effect that the notebooks had been served *before* the filing.

with the Tenth Circuit's construction, Respondents assert that the conflict among eleven circuits over the meaning of "based upon" is "one whose consequences are quite limited" that should go unresolved. Opp. Brief at 6-7. That statement and the supporting arguments related to it, among other things, reveal a fundamental misunderstanding of the FCA and the role of *qui tam* suits.

No one can debate that the FCA exists solely to combat fraud against the Government. The *qui tam* provisions play a central role in that pursuit. As this Court noted almost sixty years ago, "one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (citation omitted).

Indeed, *qui tam* suits address "perhaps the most serious problem plaguing effective enforcement" of the FCA: a "lack of resources on the part of Federal enforcement agencies." S. Rep. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. Congress amended the FCA in 1986 to "encourage *more* private enforcement suits." *Id.* at 23-24, 1986 U.S.C.C.A.N. at 5288-89 (emphasis added).

Nonetheless, Respondents claim that the provisions governing who may bring a *qui tam* suit are relatively unimportant and as a result do not merit the Court's attention. Petitioner respectfully urges the Court to scrutinize Respondents' misguided reasoning.

First, the interpretation of "based upon" has serious consequences. Too broad a definition needlessly bars private enforcement suits that should otherwise go forward. In light of the enormous consequences of fraud committed against the Government, no eligible relator should be blocked.

Respondents counter that every legitimate relator can still proceed provided he satisfy the erratically narrowing "original source" exception. That might be true where the size of the exception matches the breadth of the trap; however, as this case vividly demonstrates, the Tenth Circuit has adopted interpretations that bar too many under the "based upon" umbrella, yet excuse far too few as "original sources." Thus, legitimate informers are kept from pursuing fraud allegations and also risk prosecution and other dire consequences should they come forward. That would be bad enough where the Department of Justice elects to intervene (at least the perpetrator can still be made to repay the fraud); but it is wholly unacceptable, in a case like this, where the Department opts out.

Respondents' next argument – the notion that the issue does not matter because it does not affect the "substantive" provisions of the FCA or the "concomitant obligations of the government contractors" – is wholly irrelevant. Opp. Brief at 9. If the *qui tam* provisions were completely read out of the FCA – a result we assume even Respondents would agree is wrong – the substantive provisions of the FCA and the obligations of government contractors would not be affected. Would that result therefore be "inconsequential" too? The entire point of the *qui tam* provisions is to encourage private cooperation

in finding and fighting fraud, not to define the substantive rights of the Government or its contractors.

For much the same reasons, Respondents' final argument – that there are more "significant" conflicts "of substantive consequence" involving the "rights of defendants and the United States" – completely misses the mark. The precise contents of the "substantive" FCA are only important to the extent someone is enforcing them. The *qui tam* provisions are meant to ensure that someone always is.

Perhaps Respondents really intend to suggest that claims of fraud in connection with Medicaid and/or Medicare billing are of no real moment. Be that as it may, it should be recalled that the rule laid down in the Tenth Circuit will apply to all Government contractors, including operations at Lockheed Martin, Boeing, Raytheon, and the Los Alamos National Laboratory, to name just a few residing within the Tenth Circuit.

B. There Is No Basis For A Deemed Waiver Under the Circumstances

Respondents also urge the Court to leave the conflict unresolved based on a supposed waiver of the issue as a result of Petitioner not pressing the District Court to adopt his reading of "based upon." Respondents do not remind the Court that the question was, as Respondents themselves argued to the District Court, Appellant's App. at 50, already long settled by binding Tenth Circuit precedent. *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992). Neither the District Court nor even the Tenth Circuit panel had any power to adopt any

other reading. *Eberl's Claim Service, Inc. v. C.I.R.*, 249 F.3d 994, 1003 (10th Cir. 2001) (stressing binding nature of prior panel precedent).

Nonetheless, Petitioner did raise the issue before the panel, suggesting that it should call for an en banc poll. And, following the panel's adverse decision, Petitioner sought rehearing en banc, presenting the issue directly. Respondents cite no authority, nor has any been discovered by Petitioner, that would support a finding of waiver under these circumstances. *Cf. Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482, 1489 (10th Cir. 1994) (rejecting waiver where argument would have been barred).

II. This Court Should Also Address the Issue of How Much "Information" an "Original Source" Must Voluntarily Disclose Pursuant to Section 3730(e)(4)(B).

A. The Tenth Circuit's Opinion Conflicts With a Decision of the District of Columbia Circuit.

Contrary to Respondents' assertions, the Tenth Circuit's holding clearly requires a total disclosure prior to filing suit. To argue otherwise ignores the facts of this case and the practical effect of the opinion. Dr. King, through his counsel, disclosed to the Government prior to filing his *qui tam* action all the information he possessed concerning the fraud allegation except the identities of the parties – which had already been publicly disclosed in Dr. King's employment retaliation suit against Respondents. Nonetheless, the Tenth Circuit ruled that Dr. King failed to comply with the "original source" voluntary pre-

filing disclosure requirement because he did not also name any parties. Pet. Brief at 14a-15a. In effect, the Tenth Circuit denied Dr. King "original source" status because he did not provide every material fact to the Government prior to filing suit.

Respondents wrongly contend that this holding does not conflict with the District of Columbia Circuit. As noted in the Petition, "[a]t bottom, the Tenth Circuit ruled that 'the information' to be provided under section 3730(e)(4) means all the information the relator possesses." Pet. Brief at 12. Petitioner also noted that the original source provision uses the term "the information" three times in the course of one sentence and that the term presumably means the same thing each time. *Id.* Thus, the District of Columbia Circuit's interpretation of any of the three uses of "the information" bears on the Tenth Circuit's holding regarding the same term from the same statutory provision. The District of Columbia Circuit held that "the information" means "any essential element of the fraud transaction." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 647 (D.C. Cir. 1994). Obviously, "any" essential element does not mean "all" or "every" essential element. Unless Respondents believe that "the information" in section 3730(e)(4)(B) takes on varying meanings depending on which clause of the provision's sentence it appears in, the Tenth Circuit's broad construction of the term conflicts with the District of Columbia Circuit's narrower view.

B. There is no Justification for the Tenth Circuit's Holding

Respondents, like the Tenth Circuit, take the view that the "original source" voluntary disclosure requirement was meant to provide notice of fraud to the Government. Opp. Brief at 16-17. However, that position cannot be reconciled with the language or structure of other provisions in the False Claims Act, nor the history of the "original source" provision. The point of the exception is to protect relators, not to provide the Government with information already required to be disclosed under other FCA provisions. *See generally* Pet. Brief at 13-18.

CONCLUSION

For the foregoing reasons, and those contained in the Petition for Certiorari, the Writ should be granted.

Respectfully submitted,

DAVID J. SCHENCK
Counsel of Record
STANFORD PURSER
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201
(214) 939-5500